lic welfare. Thus, when closely considered, these ordinances are not strictly speaking prohibitive. They are regulative, and are only prohibitive as to a certain limited class, in the one case free negroes, and in the other pawnbrokers. Examining the principal case, we find that the right to sell pistols, etc., in the City of Richmond is not taken away from any one outside of the limited class of licensed pawnbrokers or persons acting as pawnbrokers. All others are free to pursue this occupation under the state license, upon paying the city license tax. It will be noticed that the ordinance in question here also declares it unlawful "for any licensed merchant, dealer in secondhand articles of other persons to sell or otherwise dispose of any such weapon without first having obtained a permit from the Chief of Police of the City of Richmond authorizing such merchant, dealer or persons to purchase or sell such weapons." If this applies to the ordinary sale of such weapons, in usual course of business by a merchant, as it literally does, and should a case arise under this clause, and a licensed merchant be refused the permit here provided for, under a policy of the city to stop the sale of such weapons entirely, we think the question will be squarely presented whether such a prohibitive ordinance nullifying the license to sell such weapons is valid. And we think it can be forcibly and successfully argued that it has never been squarely decided in this state, although both counsel and court seem to assume that it is presented in this case.

J. F. M.

ADAMS EXPRESS CO. v. SCOTT.

Jan. 18, 1912.

[73 S. E. 450.]

1. Carriers (§ 218*)—Carriage of Live Stock—Limitation of Liability.—A common carrier is not an insurer of animals from injuries arising from their vicious nature and propensities, and which could not have been prevented by the exercise of foresight, vigilance, and care, so that an express company was entitled to limit its liability in that respect.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927-949; Dec. Dig. § 218.*]

2. Carriers (§ 213*)—Carriage of Live Stock—Liability for Injuries.—No recovery can be had for injury caused by delay in shipment of an animal by an express company, where such delay was caused by the refusal of the owner to accept freight movement.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 213.*]

3. Carriers (§ 215*)—Carriage of Live Stock—Liability for Injuries.—No recovery can be had for injuries to a horse delivered for shipment, caused by the horse hitting his feet, legs, and body against

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

the sides and back of the stall upon becoming excited and frightened by the usual and ordinary movements and noise of the train.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 215.*]

4. Carriers (§ 228*)—Carriage of Live Stock—Liability for Injury. —In an action for injuries to a horse delivered for shipment, evidence held to show that the injury was caused by the inherent vice of the animal, and by the culpable negligence of the agents of the shipper.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.*]

Error to Circuit Court, Accomack County.

Action by John L. Scott against the Adams Express Company. From a judgment for plaintiff, defendant brings error. Reversed and remanded.

W. R. Meredith and *John S. Parsons*, for plaintiff in error.

Westcott & Turlington, Mapp & Mapp, and *O. F. Mears*, for defendant in error.

WHITTLE, J. The plaintiff in error, Adams Express Company, brings this writ of error to review a judgment for $1,213.70, recovered against it by the defendant in error, John L. Scott.

The litigation arose out of a written contract between the company and Daugherty, agent for the plaintiff, for the transportation of race stallion, Signet Prince, from Tasley, a station on the New York, Philadelphia & Norfolk Railroad, in Accomack county, Va., to Pocomoke City, in the state of Maryland, a distance of 27 miles. Ten race horses and traps were included in the shipment, all of which with the exception of Signet Prince reached their destination in safety.

The contract, among other provisions, stipulated that the company should not be liable for the conduct or acts of the animals to themselves or to each other, "such as biting, kicking, goring or smothering, nor for loss or damage arising from the condition of the animals themselves or which results from their nature or propensities, which risks are assumed by the shipper." The shipper, moreover, released the company from liability "for delay, injuries to or loss of said animals," unless caused by negligence of its agents or employees. Also, upon the arrival of the animals at destination, the shipper agreed forthwith to receive them, paying the charges due thereon; in default whereof the company, as agent of the shipper, might have the animal put in a suitable place, at his cost and risk. When the animals were accompanied by the owner or an attendant in his employ, as in the instant case it was his duty to load and unload them at his own risk, the company furnishing necessary laborers to assist in the work, and to take care of them in transit, such care-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

takers to be transported upon the same car with the animals free of charge.

[1] That it is permissible for an express company to stipulate with the shipper for such limitations upon its liability in a contract for the carriage of live stock is well settled.

In 1 Hutchinson on Carriers (3d Ed.) § 336, distinguishing between the liability of a carrier with respect to the transportation of live animals and ordinary goods, the learned author observes: "The liability of the common carrier of animals, it is said, is essentially different from that of the carrier of merchandise or of inanimate property. While common carriers are insurers of inanimate goods against all loss and damage, except such as is inevitable or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care. In the transportation of live stock, in the absence of negligence, the carrier is relieved from responsibility for such injuries as occur from or in consequence of the vitality of the freight. He does not absolutely warrant live freight against the consequences of its vitality. Animals may injure or destroy themselves or each other, they may die from fright or starvation, or they may die from heat or cold. In all cases, therefore, where injuries occur by reason of the inherent vices or natural propensities of the animals themselves, the carrier is relieved from responsibility, if he can show that he has provided all suitable means of transportation, and exercised that degree of care which the nature of the property requires. And the opinion has been frequently expressed that, owing to the peculiarities of such freight, the carrier in its transportation was not to be considered as assuming the responsibilities of the common carrier, and that it was always competent for him to make his own terms upon which he would consent to carry it"—citing opinions of Pollock, C. B., and Martin, B., in Pardington *v.* Railway Co., 1 H. & N. 396; Erle, J., in McManus *v.* Railway, 4 H. & N. 347; Parke, B., in Carr *v.* Railway, 7 Exch. 711.

The rule is thus stated in Boehl *v.* Railway Co., 44 Minn. 191, 46 N. W. 333: "Carriers of live stock are liable as common carriers for damages or injuries thereto arising during the transportation, except such as, without the fault or negligence of the carrier, result from the vitality of the freight; that is to say, the nature and propensity of animals to injure themselves or each other, their unruliness, fright, viciousness, kicking, or goring, etc. The carrier is relieved from liability from such causes, if he has provided suitable means of transportation, and exercised that degree of care which the nature of the property requires, or has not

otherwise contributed to the injury. Of course, the carrier is relieved from special care and oversight of the animals when the owner or agent accompanies them for that purpose." Norfolk, etc., R. Co. *v.* Reeves, 97 Va. 288, 33 S. E. 606; N. & W. Ry. Co. *v.* Sutherland, 105 Va. 545, 54 S. E. 465.

These rules are said to obtain, even where there is no special contract limiting the carrier's liability in respect to injuries resulting to animals from such causes.

Bearing in mind, then, these fundamental principles, let us briefly consider the alleged grounds of negligence and the evidence relied on to sustain the recovery.

[2] First. It is alleged that the injuries sustained by Signet Prince were due to unnecessary delay in transportation. There is no evidence whatever to connect the animal's injuries with the alleged delay. Besides, it plainly appears that the delay was due to the refusal of Daugherty to accept freight movement. When told that his car load of horses would be attached to an extra freight, used in transporting other horses, which was to leave about 10 o'clock a. m., he refused to allow his horses to be carried by that train, and demanded express shipment. Accordingly, in deference to his wishes, his car was taken up by the first express train that passed Tasley, and left that station about noon.

[3] Second. It is said that during the delay at Tasley the company suffered the car "to be switched around, backward and forward on the railroad track and switches, and jarred, jerked, and kicked up to and against other cars;" and, consequently, the horse became greatly excited and frightened, and hit his feet, legs, and body against the sides and back of the stall, and against a radiator installed therein, and was injured, etc.

It was shown that the movements of the car at Tasley, complained of in this specification, were all necessary movements in the ordinary course of railroading.

Third. This allegation of negligence is germane to the second, namely, that the horse was frightened and injured by the puffing of smoke and noise from passing engines. These acts were done, not wantonly, but in the customary manner, and were unavoidable in the operation of trains.

Fourth, and lastly, it is charged that the company negligently failed to provide and maintain a safe car, stall, and appliances for the shipment of the animal. Under this specification, it is also alleged that the company negligently suffered a radiator to be in the stall in which Signet Prince was placed, which was uncovered, and against which he hit his feet and legs, and injured himself.

The car in question was a Pennsylvania express car, in which Daugherty had shipped a load of horses from Cape Charles to Tasley a few days previously. The car had at that time, been

stalled in accordance with his wishes, and at his special request was again furnished to him by the company for the shipment to Pocomoke City.

As observed, the shipment consisted of 10 horses, and they were accompanied by 9 attendants. The car contained 14 stalls. The agreement required the shipper to load and unload the stock, the company furnishing necessary assistance, and Signet Prince was either the first or second horse loaded, so that there were 12 or 13 stalls besides the one containing the radiator, in any one of which he might have been safely bestowed. It was also shown that a radiator is a permanent fixture and necessary part of the outfit of a car used in shipping high-grade horses in cold weather. But in this instance the shipper could have obviated all risk of injury to the animal from that source simply by placing him in, or removing him to, another stall (and three vacant stalls still remained after accommodating all the other horses), or by covering the radiator with a horse blanket. Signet Prince was, however, made fast in the stall with the radiator by ropes on either side of his head, tied to an iron bar above, extending across the car. He became frightened, presumably from passing engines, before the car left Tasley, and in his efforts to escape sustained some injury by kicking and plunging. He kicked down a mail box from the side of the car, and broke from their fastenings several half-inch iron bars that protected the car window. His fright continued, and before the train reached its destination, (just how long before does not appear) he forced the radiator from the side of the car, and broke the regulator wheel from the valve, leaving exposed a half-inch copper tube of considerable length, and was finally discovered astride of the radiator, with the valve tube embedded in the inner side of his left thigh. The injuries thus inflicted were of a serious and permanent character. The attendants made no effort to release the animal from his perilous position, and the shipper refused to unload or receive him at Pocomoke City. The company thereupon placed him in the care of a suitable person, where he remained from August 8 to November 18, 1908, when he was delivered to the plaintiff, on payment of charges for his care and keep.

There was also an effort to prove that the company negligently refused to unload the horse at Tasley and other stations after his car fright became manifest, or to side-track the car at Parksley; but the evidence on that subject was wholly unsatisfactory and insufficient. Indeed, Daugherty, the shipper and agent of the owner, seemed possessed of the erroneous idea that he was under no obligation whatever to care for the safety of the horse, but could stand idly by and suffer the animal to destroy himself, and hold the express company liable for the loss.

[4] There are a number of other assignments of error in the

petition for a writ of error, but the court is of opinion that the failure of the shipper to make out a case of actionable negligence against the express company is controlling; and it is therefore unnecessary to notice subordinate assignments. The injury to Signet Prince was due to no fault of the defendant, but was traceable rather to the inherent vice or propensity of the animal itself, coupled with the culpable negligence of the agents of the shipper to whom its safety had been confided.

For these reasons, the judgment must be reversed, the verdict set aside, and the case remanded for a new trial.

Reversed.

Note.

The exception to the liability of carriers of livestock at common law, alluded to here, is confined to such losses and damages as, without the fault or negligence of the carrier, result from the vitality of the freight, i. e., from the nature and propensity of the animals themselves. Maslin *v.* Baltimore, etc., R. Co., 14 W. Va. 180.

For other damages or injuries arising during the transportation, except such as are inevitable or caused by the public enemy or default of the owner, the carrier of live stock is liable as an insurer. Maslin *v.* Baltimore, etc., R. Co., 14 W. Va. 180; Herring *v.* Chesapeake, etc., R. Co., 101 Va. 778, 45 S. E. 322.

With the exception above stated, they are insurers, as are carriers of goods. Gulf, etc. R. Co. *v.* Trawick, 86 Tex. 314, 317, 4 S. W. 567. This is the substance of the authorities quoted in the opinion of the court here, except what is said in Hutchison on Carriers as to the opinion "frequently expressed that, owing to the peculiarities of such freight, the carrier in its transportation was not to be considered as assuming the responsibilities of the common carrier, and that it was always competent for him to make his own terms upon which he would consent to carry it." The latter is not supported by the weight of authority or the Virginia cases.

Such being the common-law rule as to carriers of live stock, of course a contract limiting the carrier's liability to that extent is valid and merely declaratory thereof. But if such contract goes beyond this and attempts to limit the liability further, as for any other loss or damage not due to negligence, as the contract does here, it comes in conflict with the rule of Chesapeake, etc., Ry. Co. *v.* Pew, so often alluded to (see 15 Va. Law Reg. 145) and is invalid. That rule denies to common carriers the right to limit their common law liability in any way by contract, construing § 1294c (25) to so enact. It is true the loss here was due to "inherent vice," and to that extent the carrier is properly held exonerated, but the language of the court would imply that the contract was valid in its full extent. Section 1294c (25) makes no distinction between carriers of goods and of live stock, and none can be read into it. Indeed it has been held in Texas that the statute of that state prohibiting "common carriers of goods, wares and merchandise" from attempting to restrict their common law liability, includes carriers of live stock as well as any other property. Missouri, Pac. R. Co. *v* Harris, 1 White and W. Civ. Cas. Ct. of App. § 733.

It is a curious fact that § 1294c (25) is identical with § 1294l, showing what a patchwork affair our Code is, and how much we need a revision.

J. F. M.